

**Before the
Federal Communications Commissions
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Review of Regulatory Requirements for |) | CC Docket No. 01-337 |
| Incumbent LEC Broadband |) | |
| Telecommunications Services |) | |

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Covad Communications Company (Covad), by its attorney, hereby respectfully submits its comments in response to the above-captioned inquiry. As the nation's largest nationwide provider of broadband services using xDSL technology, Covad is uniquely positioned to provide the Commission crucial input into its analysis of SBC's request for nondominant regulatory classification. Because the retail services offered by Covad compete directly with services provided by SBC and other Bell companies, Covad is greatly impacted by the Commission's inquiry into the regulatory classification of BOC services.

The Commission has undertaken a broad inquiry into the feasibility of declaring incumbent LECs, and in particular the Bell Operating Companies (BOCs), to be nondominant in the provisioning of broadband services. The basis for the Commission's inquiry is a petition filed by SBC, which asks the Commission to declare SBC nondominant in what SBC terms the "broadband market." The Commission has two challenges in this proceeding if it is to do what SBC asks. First, SBC asks the Commission to attempt, in a factual vacuum, to identify the relevant product, geographic, and any other necessary market definitions for purposes of its inquiry. Second, the Commission must determine what, if any, adjustments it must make in its current regulatory regime in order to grant such relief as it deems necessary to promote

broadband deployment by SBC and its BOC brethren. Covad respectfully submits that, in the first instance, no such regulatory favoritism is justified: the Bells have demonstrated their capability to deploy broadband services at a rapid pace. Indeed, the Commission own's Report to Congress issued just weeks ago concluded that the incumbent telephone companies collectively control 93% of the nationwide ADSL market. Such market dominance suggests, on its face, not only that the Bells are not entitled to a declaration of nondominance, but also that they are in need of no regulatory "relief" in order to successfully deploy broadband services. The Commission's determination in its Report to Congress that broadband services are being deployed in a reasonable and timely manner should form the starting point for the Commission's resolution of this inquiry. The Bells should bear a heavy burden of proving that they are unable to deploy broadband services without assistance from the Commission. The facts demonstrate otherwise.

Equally importantly, Covad is concerned about any pronouncements the Commission may make regarding market definitions in this proceeding, because such determinations outside the communications merger context are extremely fact specific inquiries, generally undertaken by the courts, the Department of Justice, and the Commission only in limited, fact-specific inquiries such as, for example, a merger analysis of two companies. Such regulatory pronouncements, if undertaken in a wide-sweeping manner as proposed by SBC, can impede future Commission efforts to regulate (or deregulate) incumbent services. Market definition inquiries are very fact-intensive inquiries that are not particularly suited for resolution in a rulemaking proceeding. It is not appropriate for the Commission to undertake such an inquiry when other, more narrowly tailored, means of addressing the issues under consideration are available, as discussed below. In short, the Commission should take pains to avoid market

segment and product market analyses and leave such inquiries to the specific proceedings that actually necessitate such fact-specific undertakings.

In these comments, Covad makes two basic arguments. First, Covad argues that the Commission need make no conclusions or findings related to the appropriate market definitions in this proceeding – and indeed should undertake no such analysis at all -- because such findings are irrelevant to the underlying question of whether the BOCs actually need regulatory relief in order to deploy broadband services. Rather, the Commission need only determine whether such relief is necessary and, if it is, to utilize its existing forbearance authority to grant it. Although Covad submits that any such relief is unnecessary, it is equally important that the Commission confine its analysis to the question to the actual relief sought, rather than undertake a broad (and unnecessary) market analysis that could have unintended consequences. Second, Covad argues that this proceeding is not suited to accurate resolution of inherently fact-intensive questions of market definition, and thus the Commission should not undertake any inquiry into product or geographic markets as part of this proceeding. SBC's proposed market definitions fail to take account of a wide variety of issues and complexities that would accompany such an analysis, and the Commission should hesitate before making unnecessary analyses and conclusions that may unduly prejudice unforeseen future proceedings. In short, the Commission should undertake no market analysis whatsoever.

II. THERE IS NO NEED FOR THE COMMISSION TO ENGAGE IN ANY MARKET DEFINITION ANALYSIS TO DECIDE WHETHER TO GRANT SBC THE RELIEF IT SEEKS

The Commission Should Use Its Forbearance Authority to Carefully Streamline Incumbent LEC Regulation Where Appropriate, if at All.

The goal of this proceeding is to develop a regulatory framework for incumbent LEC provision of broadband telecommunications services that strikes an appropriate balance between creating necessary incentives to deploy such services, to promote competition, and to reduce

regulation.¹ Covad submits that, to the extent the Commission determines that any adjustments to its current regulations are necessary, the Commission should utilize its forbearance authority under section 10 of the 1996 Act to provide any targeted regulatory relief for incumbent LEC provision of broadband services that the Commission believes is warranted by the record developed in this proceeding. Section 706 of the 1996 Act specifically contemplates that the Commission would utilize its section 10 forbearance authority to promote the deployment of advanced services.²

Such an approach is preferable to any attempt to define product markets and assess incumbent LEC market power in order to determine whether they are dominant or non-dominant. As set out below, the Commission would have to consider and analyze a wider, and more complex array of customers, services, and geographies than suggested by SBC. The effort to assess incumbent LEC market power is not only unnecessarily burdensome, but could also unnecessarily tie the Commission's hands in designing an appropriately streamlined regulatory regime. Market analysis, such as proposed by SBC, is generally an extremely fact specific and complex analysis undertaken, for example, in the context of a merger of two companies. Attempting to engage in such an analysis in as broad a proceeding as this could have unforeseen consequences. For example, for the reasons discussed below, incumbent LECs should continue to tariff their DSL services. A designation of nondominance may make it difficult to continue (or re-impose) this requirement. This is not to say, however, that tariff filing requirements could not be streamlined, rather than eliminated, through the use of the Commission's forbearance authority. The Commission may consider, for example, permitting tariffs to go into effect on one

¹ The Notice states that the Commission seeks to determine on how it can "best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation." Notice at ¶ 4.

² Section 706 provides in relevant part that the Commission encourage the deployment of advanced services "by utilizing, in a manner consistent with the public interest, convenience and necessity, regulatory forbearance,

day's notice and easing certain cost support data requirements. The Commission would have more flexibility utilizing its forbearance authority than it would utilizing the blunt instrument of dominant and non-dominant status which may require wholesale shifts in regulatory treatment.

In terms of regulatory safeguards, Covad submits that a certain level of general Title II regulation remains necessary. It would not be in the public interest, for example, to detariff incumbent LEC xDSL services. Continuation of some tariffing requirements for ILEC xDSL services is particularly important for the wholesale market because ISPs and other entities utilize incumbent LEC xDSL services as inputs. A degree of general Title II regulation is also necessary to ensure that incumbent LECs comply with certain of their section 251 obligations. One area of particular concern to Covad is the incumbent LEC's obligation to provide line sharing. The Commission has identified the high frequency portion of a loop as a separate unbundled network element (UNE).³ Line sharing enables companies such as Covad to provide xDSL services over the same line that the customer uses to obtain its voice service from the incumbent LEC. Line sharing is designed to place competitive carriers on the same footing with incumbent LECs who provide their xDSL service over their customer's existing lines. As the Commission has recognized, line sharing is vitally important to the development of competition for broadband services, especially for residential customers, and in promoting the rapid deployment of advanced services to all Americans.⁴

In order for line sharing to work effectively, competitive carriers must be charged the same price for the high frequency portion of the loop as the incumbent LEC imputes to its own retail xDSL service. As noted by the Commission, this approach alleviates any potential price

measures the promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment." Section 706 is not an independent grant of forbearance authority.

³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket 98-147 (1999) (*Line Sharing Order*)

⁴ *Line Sharing Order*, ¶¶ 5,6.

squeeze which could occur when the incumbent LEC allocates little or no loop costs to their xDSL services, but requires competitive LECs, when offering xDSL service, to purchase access to a second line and pay the full unbundled loop costs. The Commission concluded, “[b]y requiring incumbent LECs to provide access to the shared local loops for no more than they allocate to their own xDSL services, the price squeeze may be redressed by ensuring competitive LECs and ILECs incur the same cost of access to the bandwidth required to provide xDSL service.”⁵

To avoid this potential price squeeze, however, competitive LECs, this Commission, and the state commissions must know the loop costs that incumbent LECs allocate to their xDSL service. This information must be made available, either through tariff filing with cost support, or some other mechanism that provides sufficient transparency to identify with some assurance of validity the loop costs that the incumbent LEC allocates to its xDSL service that it provides over existing voice lines.⁶

The continued tariffing of xDSL services would also facilitate enforcement of the nondiscrimination requirements of section 272 of the Act to the extent that a BOC interLATA affiliate utilizes or bundles BOC provided broadband services with its own interLATA broadband offerings for larger business customers.⁷ Moreover, the Commission has held that if a BOC’s provision of an Internet access services incorporates a bundled, in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that

⁵ *Line Sharing Order*, ¶141.

⁶ *See Line Sharing Order* at ¶ 140 (“We find it reasonable to presume that the costs attributed by LECs in the interstate tariff filings to the high-frequency portion of the loop cover the incremental costs of providing xDSL on a loop already in use for voice services.”)

⁷ For example, Section 272(b)(5) requires that all transactions between the BOC and the 272 affiliate be conducted on an arms length basis. Section 272(c)(1) prohibits BOCs from discriminating between its 272 affiliate and any other entity in the provision or procurement of any goods, services or facilities, and section 272(e)(4) provides that BOCs “may provide any interLATA or intraLATA facilities or services of its interLATA affiliate is such services or facilities are made available to all carriers at the same rates and the same terms and conditions, so long as costs are properly allocated.”

service must be provided through a section 272 affiliate, after the BOC obtains section 271 authority.⁸ As BOCs obtain section 271 authority, they no doubt will provide not just last mile Internet access but also Internet backbone services. In that situation, BOCs must provide high-speed Internet access services such as xDSL through the section 272 affiliate under the requirements of the *Non-Accounting Safeguards Order*. To the extent the section 272 affiliate obtains any services or facilities from the BOC, such as xDSL service, that the affiliate utilizes in its Internet access service, the affiliate must obtain such services and facilities on the same terms and conditions as are available to other entities or carriers. Maintaining tariffed terms and conditions will greatly facilitate enforcing compliance with the section 272 nondiscrimination requirements. As noted above, however, the Commission could significantly streamline the tariff filing and approval procedures for the BOCs. Regardless of what kind of such relief the Commission deems necessary, it can be accomplished through forbearance, rather than the complex market definition and analysis that SBC has asked the Commission to undertake.

II. ANALYSES OF RELEVANT MARKETS AND ATTEMPTS TO DEFINE MARKETS ARE UNNECESSARY, BEYOND THE SCOPE OF THIS PROCEEDING, AND SHOULD NOT BE UNDERTAKEN.

SBC set out in its petition, and the Commission repeats in its Notice, certain geographic and product market definitions. SBC asks the Commission to define the broadband market as set out in its petition in order to support its claim that it is a nondominant provider of broadband services, and thus should be exempted from certain Commission rules. As set out below, SBC's proposed market definitions ignore wide categories of products and services, and thus provide an inappropriate basis for the Commission's use in defining markets. In short, the "broadband" market does not, despite SBC's suggestion, exist in a vacuum. The Commission could not undertake an analysis of SBC's dominance in the "broadband" market without analyzing

⁸ *Non-Accounting Safeguards Order*, ¶ 127

separately the broader Internet access market – including all means by which consumers and businesses access the Internet and other data networks. This analysis would have to encompass many more products, services, geographies, customers, and other issues than SBC allows in its petition. For this reason, Covad suggests that there is no need for the Commission to engage in *any* market definition analysis, because the relief sought by SBC, although not necessary, could be granted by the Commission via forbearance.

The Commission seeks comment on the relevant product markets for incumbent LEC provision of broadband telecommunications services. Following the suggestion of SBC, the Commission focuses on two potential market segments, a mass market consisting primarily of residential consumers, and a larger business market for high-speed transport services such as Frame Relay and ATM. In its haste to provide support for its own petition, SBC ignores or glosses over critical issues that the Commission would have to examine, were it to undertake such a market analysis. Specifically, SBC ignores dial-up Internet access, and second lines, and the extent to which broadband is a substitute for such services.⁹ In particular, as discussed below, the Commission's determination whether incumbent LECs have market power in the Internet access market, however defined, is completely unnecessary.

The Commission asks whether a separate product market exists for mass-market broadband telecommunications services. This question has been rendered premature, if not irrelevant, by the Commission's *Broadband Internet Access* proceeding. This is because the

⁹ Although SBC ignores the issue in its petition, the Commission must recognize that it is highly questionable that broadband itself is a separate market from other means of access to the Internet. For example, consumers generally consider broadband Internet access to be a substitute for dial-up access to the Internet, suggesting that the dial-up and broadband Internet access services do not constitute separate markets. Of course, should the Commission define the relevant market as the Internet access market, rather than the narrow market definition SBC proposes, it should have little trouble finding the Bells dominant, which explains why SBC would not ask the Commission to take this path. This is because consumers who access the Internet via dial-up connections – and there are tens of millions in the U.S. – access the Internet via local telephone lines controlled by the Bells and other incumbent LECs. Indeed, the FCC's Local Competition Scorecard, released just this week, concluded that incumbent telephone companies

only relevant mass-market broadband product, for purposes of discussing the regulatory obligations to which retail broadband services provided by incumbent LECs should be subject, is Internet access service. Mass market residential consumers do not purchase xDSL transmission service unless those services are bundled with Internet access services. This is confirmed by *SBC's Forbearance Petition*, which identifies high speed Internet access as the residential product for which it seeks nondominant treatment. The appropriate regulatory regime for high speed Internet access service is, however, the subject of the *Broadband Internet Access* proceeding where the Commission has tentatively concluded that such service is an information service.¹⁰ In effect, the *Broadband Internet Access* proceeding has trumped this proceeding, as the more fundamental question of whether high speed Internet access service is a telecommunications service should be answered before considering the appropriate level of Title II regulation that should apply to such services.

As noted above, SBC's petition confirms that the Commission's market analysis would have to include a broad analysis of all Internet access services, regardless of speed or platform. As SBC acknowledges, "[a]dvanced services for use by mass market consumers are used almost exclusively for a single application: high-speed access to the Internet service provider's point of presence."¹¹ It is with respect to this product that SBC contends that there is intermodal competition, and that regulation of retail BOC DSL services is thus unnecessary. SBC argues that there are at least four different platforms – xDSL, cable modem, satellite and fixed wireless - - that should be considered interchangeable with "*broadband Internet access services* used by

control over 90% of the local telephone market. Adding in the percentage of CLEC-provisioned lines that are actually provided over ILEC-owned facilities, and the ILEC market share increases even more.

¹⁰ Given the implications of such a determination, Covad will submit separate comments to the Commission in the *Broadband NPRM* docket setting out a recommended course for the Commission to take in that proceeding.

¹¹ *SBC Forbearance Petition* at 20.

mass-market customers.”¹² SBC’s experts, Robert Crandall and J. Gregory Sidak also argue that the relevant residential product proposed by SBC is high-speed Internet access service, not simply stand alone xDSL.¹³ SBC does not contend that stand-alone xDSL service is a relevant product among residences purchasing broadband services.

The distinction between whether [the fewer times we actually use the word “market,” the better] the Commission would be required to analyze Internet access or stand alone xDSL has been rendered vitally important, given how the Commission has proposed to proceed in the series of rulemakings concerning broadband deployment. The Commission intends this proceeding to address the regulation of broadband services under Title II of the Communications Act. As noted above, the Commission has initiated a separate proceeding to determine the appropriate regulatory classification of broadband Internet access service and has tentatively concluded that this service is an information service, not a telecommunications service subject to Title II regulation.¹⁴ Thus, the relevant residential product proposed by SBC in its petition -- broadband Internet access service -- is properly the subject of the Commission’s *Broadband Internet Access Notice*, not this proceeding. If the Commission ultimately concludes that broadband Internet access service is an information service, then the question of dominant versus non-dominant regulation with respect to that product is moot, because the Commission will have *de jure* altered the regulatory classification of such services. Indeed, the Commission has even asked in the *Broadband Internet Access Notice* whether stand alone DSL should be considered a

¹² *Id.* at 20-21 (emphasis added). That the product SBC is describing is Internet access service, not stand alone DSL, is further evidenced by SBC’s reference to the Commission’s determination in *AOL-Time Warner* that “high-speed Internet access services constitute the relevant product markets . . .” *Id.* at 21 & n. 59.

¹³ *Crandall/Sidak Decl.* at ¶ 34 (The findings of the FCC, the DOJ, the FTC and academicians that all mass market *broadband Internet access services* are in the same product market are correct)(emphasis added); ¶ 35 (“all mass-market *broadband Internet access services*, including most importantly, DSL and cable modem service, are part of the same product market”) (emphasis added).

¹⁴ *Broadband Internet Access Notice* ¶ 17. Covad takes no position on that tentative conclusion in these comments.

telecommunications service (which it has been, and should continue to be), further calling into question the relevance of this proceeding.¹⁵

The Commission should not attempt to define a relevant market until it determines the regulatory classification of Internet access services provided by incumbent LECs. Such an attempt would not only be unnecessary, given the lack of a relevant stand alone broadband product for residences, it could lead to unintended consequences given that the nature of services that ultimately may be offered over nascent broadband facilities is unknown.

Broadband Services Provided to Larger Business, to the Extent They are InterLATA Services, are Subject to Section 272 of the 1996 Act and the Commission's Implementing Regulations.

The Commission also seeks comment on whether the other potential market identified by SBC, the broadband market for larger business users, constitutes a separate relevant product market. Following *SBC's Forbearance Petition*, the Notice specifically asks if the following services would fall within such a market: Frame Relay, Asynchronous Transfer Mode (ATM), Gigabit Ethernet (GigE), Switched Multimegabit Data Service (SMDS), and Remote Local Area Network (RLAN) Services.¹⁶ Ultimately, the Commission seeks to determine whether incumbent LECs are dominant in the provision of these services and seeks comment on the appropriate regulatory requirements.

Defining a larger business market for high speed data products such as Frame Relay and ATM services is unnecessary because these products are, to a large extent, provided on an interLATA basis.¹⁷ As SBC notes in its petition, the larger business customers typically utilize these packet switching services to connect multiple points within multiple LATAs. As stated by

¹⁵ *Broadband Internet Access Notice* ¶ 26.

¹⁶ Notice ¶ 22.

¹⁷ This is not to say that such services are not provided on an intraLATA basis – they are in large volumes. The Bell companies dominate the intraLATA market for such data services as ATM, T-1, and Frame Relay as well.

SBC, eighty-eight percent¹⁸ of all ATM and Frame Relay revenues are from provision of such services on an interLATA basis, whereas only twelve percent are on a purely local basis.¹⁹ Therefore, as a practical matter, to the extent these services are provided by BOCs, the regulatory requirements for these services are established in section 272 of the 1996 Act and the Commission's implementing regulations. Moreover, the Commission has already addressed the question of whether BOCs are dominant or non-dominant in the provision of all interLATA services in the *LEC Classification Order*.

The Commission has determined that BOC provision of all interLATA services is subject to non-dominant regulation given the mandatory safeguards set forth in section 272 of the Act and the Commission's implementing regulations.²⁰ Once BOCs obtain authority pursuant to section 271 to provide these packet switching services on an interLATA basis, BOCs must provide those services pursuant to the requirements set forth in section 272 of the Act.²¹ This requirement includes providing the service through a separate affiliate that must comply with statutorily prescribed structural, transactional, and nondiscrimination safeguards.²² The Commission has further interpreted those requirements in its Non-Accounting and Accounting Safeguards orders. The determination of non-dominance was predicated on the existence of the safeguards established by section 272 and the Commission's implementing rules which the Commission believed to be both necessary and sufficient to limit a BOC's ability to leverage its market power in the local telecommunications market. Thus, to maintain non-dominant

¹⁸ Covad assumes, for purposes of this section, that SBC accurately calculates the percentages, by not including a BOC's intraLATA packet switching services.

¹⁹ *SBC Petition* at 37; *Crandall/Sidak Decl.* at ¶ 105. This of course suggests that the primary impediment to the deployment of these services by the BOCs is not dominant carrier regulation, but rather the statutory prohibition on the provision of interLATA services set forth in section 271 of the 1996 Act.

²⁰ *LEC Classification Order*, at ¶ 82. In making this determination, the Commission concluded that the relevant product market included all interLATA services. *Id.* at ¶ 50.

²¹ Section 272(a)(2)(B) requires BOCs to provide originating interLATA telecommunications services through a section 272 affiliate, with certain exceptions not relevant here.

²² See, e.g., 47 U.S.C. 272(b), (c), (e).

treatment for these broadband products, BOCs must continue to comply with the requirements of section 272 and the Commission's implementing regulations.

Beyond the section 272 issues, SBC's definition of the business market proposed in its petition does not address the vast majority of issues that would face the Commission if it attempted to analyze business purchasers. In particular, SBC narrows its focus to large businesses, ignoring the seven million small to medium sized business customers whose access to broadband services would be affected by the relief that SBC seeks in this proceeding. In particular, SBC ignores the reality that CLECs like Covad compete with ILEC business products among small to medium sized business that the ILECs themselves serve with the same products as offered to large businesses -- namely, T-1 service. In addition to HDSL and SDSL business-class DSL products, Covad also provides its own T-1 service via its TeleXtend business product.

As noted, SBC's petition argues that there are only two relevant product markets, the mass market and the larger business market. The Commission correctly recognizes that these customer segments may be overly simplified and seeks comment on whether the customer segments should be more sharply defined.²³ The Commission thus seeks comment on whether broadband services that are marketed to small and medium enterprises (SMEs)²⁴ and to small or home offices (SOHOs) constitute a separate product market that should not be aggregated into the same customer grouping as the mass-market or larger businesses markets.

The two categories proposed by SBC are in fact overly simplified and mask a complicated analysis of various classes of business customers that the Commission would have to undertake. There is a distinct segment of small to medium size business users that does not fit within either of the broad market segments described by SBC. The small and medium sized

²³ Notice ¶ 23.

business customers exhibits characteristics distinct from the mass market posited by SBC. First, the mass market posited by SBC utilizes xDSL almost exclusively for Internet access. Small and medium sized businesses, on the other hand, utilize xDSL not just for Internet access, but also for data transmission, for example between branch locations of a single enterprise. Second, small and medium sized businesses utilize not just xDSL for broadband services, but also utilizes T-1 services, which are generally priced beyond the range of residential consumers. These business users also utilize different types of DSL service, such as SDSL and HDSL, whereas the mass market typically purchases ADSL or, in certain circumstances, dial-up services.

Another critical distinction between the mass market posited by SBC and small and medium sized businesses is that small to medium sized businesses are not subject to intermodal competition. Cable modems, satellites and fixed wireless services are not available substitutes for these businesses. As to cable, the Commission has frequently recognized that it is residential consumers, not business customers, who are targeted and addressed by cable modem services. Satellite broadband services are nascent and offer service quality levels far below those demanded by business users. Large interexchange carriers and small CLECs alike have, in recent months, cancelled their fixed wireless products, leaving the market largely devoid of such services. For small and medium sized businesses, as in the large businesses, users generally are limited to wireline broadband services offered by the incumbent LECs, and, to a much more limited extent, CLECs that utilize unbundled ILEC facilities to reach end users. The primary competing service for these businesses is T-1 service, which incumbent LECs continue to dominate.

²⁴ The Notice suggests that SMEs are typically defined as having between one and 500 employees and encompass a heterogeneous group of small entrepreneurs such as florists, dry cleaners, and gas stations, to multi-location enterprises that employ hundreds of people. Notice n. 57 (citing *Broadband Analysis* at 89.)

Small and medium sized business customers also utilize different services than the larger business customers analyzed by SBC in its petition. The SBC-proposed market consists of products such as Frame Relay and ATM, which are used primarily for interLATA data transport. SBC does not even include DSL or T-1 services as potentially substitutable products in this market. Small and medium sized business customers, however, do utilize DSL and T-1, and generally would not view ATM and Frame Relay as substitutes given the high retail costs of such services.²⁵ SBC also does not invite the Commission to analyze one of the most complex issues in this arena: voice. To the extent that the Commission analyzes the broadband services subscribed to by businesses, it would have to analyze such important products as Voice over DSL (VoDSL), Voice over ATM (VoATM), and similar packetized voice products. The Commission's finding of a BOC's nondominance in the "broadband" market as defined by SBC would immediately free the BOCs from regulation of their voice services, to the extent they continue to offer packetized voice products. As the Commission is well aware, a T-1 service is nothing more than 24 individual DS-0 circuits – in other words, 24 individual voice circuits. If the Commission declares the BOCs nondominant in the T-1 market, as SBC has asked, the Commission is in essence declaring the BOCs nondominant in the voice market. If the Commission declares the BOCs nondominant when they provide DSL, then VoDSL – a product already commercially deployed today – is an easy avenue for BOCs to take to avoid regulation of their voice services. In short, the market analysis that the Commission would have to undertake is much more complex, and involves many more subsets of business customers and services, than allowed by SBC's petition.

²⁵ SBC cites costs for DS-3 link and port for Frame Relay at \$4,435 per month plus a \$3,030 nonrecurring charge in its central region. It cites charges from AT&T of \$3,130 per month for Frame Relay and ATM at DS-1 speeds. *SBC Forbearance Petition* at 33-34.

These small and medium sized business are, the Commission should note, the core of Covad's business customer base. Indeed, more than half of Covad's 351,000 subscribers falls within this market segment.²⁶ Covad has designed products specifically to meet the needs of these business customers. Covad offers small and medium sized businesses various types of DSL services, such as SDSL and HDSL. In order to extend the reach of its services to business that cannot effectively be served by xDSL based services, Covad provides T-1 services that it provisions over its own network, using unbundled high-capacity loops. Business customers are also distinct from residential customers in the speed and quality of service demanded. For example, Covad must offer as close to the "five 9s" service quality level as possible to attract and retain business customers, whereas residential consumers are less concerned with maintaining such a level of network reliability. Covad also proactively addresses these business customers through its own, in-house sales channel, in addition to independent ISPs, whereas its residential customers are principally served by unaffiliated ISPs.

Incumbent LEC's continue to dominate the provisioning of Internet access services, whether over dial-up and second lines, or via higher speed services such as T-1. Not only are incumbent LECs Covad's main competitors in sales to both residential and business customers, but Covad relies on unbundled access to incumbent LEC loops and transport services to provide service to its customers. Covad is not aware of any commercially significant? cable-based offerings to business customers, and cable companies certainly do not offer unbundled access to their networks. As such, SBC's claims that it is "nondominant" in the broadband market are not only based on an incorrect analysis of the proper products and services to be analyzed, they are also based on a gross underestimation of the incumbent LECs' domination of the high speed data market.

²⁶ Approximately 52% of Covad's customers are small to medium sized businesses. About 48% are residential

SBC's Geographic Market Analysis, Like its Product and Customer Market Analyses, Is Oversimplified and Incorrect

In determining geographic markets, the Commission has taken guidance from the Department of Justice's merger guidelines.²⁷ The guidelines define the relevant geographic market by asking whether a customer could shift his purchase to a second location in order to avoid a price increase in the relevant product.²⁸ If so, then the geographic market is extended to include that location. The Commission has recognized that customers only view as substitutes communications services available at their location.²⁹ If DSL service is not available in Rochester, its availability in New York is not a substitute. There is no reason to depart from this precedent with respect to any broadband service. The Commission should reject SBC's suggestion that the relevant geographic area include its entire region. Such a definition is overly broad, and fails to account for important local differences in the availability of broadband services either from other wireline carriers or from intermodal competitors.³⁰

consumers.

²⁷ *LEC Classification Order*, ¶ 64.

²⁸ *Id.* at n. 174.

²⁹ *LEC Classification Order* ¶ 65; *AOL Time Warner Order* ¶ 64.

³⁰ Covad discussed in detail in this comments its strong view that the Commission should not undertake any market analysis in the course of this proceeding, because it is unnecessary to the determination of whether the BOCs require the relief they seek. Contrary to SBC's contentions, Covad believes that xDSL is part of a larger market including all means by which end-users, consumers and businesses alike, access the Internet and/or local area networks, which SBC plainly dominates, among other reasons, because a large majority of end-users still use dial-up (POTS) to access the Internet. As a practical matter, the Internet access market is segmented between small business and residential users. Some of the services a small business may practically use for Internet access (such as T1, fractional T1 and frame relay), are too expensive to be practical for use by individual residences; other services that could be used by residences for access to the Internet (such as cable-modem) have practical limitations that make them generally inappropriate for use by small businesses. Moreover, the pricing for Internet access services differs depending upon whether the end user is a small business or a residence.

From the standpoint of residential and business users, the products are:

| <u>Business</u> | <u>Residential</u> |
|-----------------------------|---------------------------|
| DSL | DSL |
| Dial-Up | Dial-Up |
| ISDN | ISDN |
| T-1 | Cable Modem |
| Frame Relay | Wireless/Satellite |
| Other dedicated, high-speed | |

The question of market definition also depends upon where you start in the analysis. Assume products A, B and C. If you start by looking at products A or C, you might find that the price is constrained by product B, but the price of

III. CONCLUSION

Covad submits that the Commission should not engage in any protracted market analysis in order to determine the merits of SBC's petition. SBC has chosen market definition issues as a means to an end, and the end that SBC seeks is not necessarily best achieved by the market analysis that SBC asks the Commission to undertake. Covad submits that incumbent LECs do not need any regulatory relief whatsoever from the Commission in order to facilitate their retail broadband deployment. Facts on the record before the Commission in this and other proceedings demonstrate conclusively that broadband deployment is exploding, and that the Bells are getting more than their fair share of the spoils. But regardless of whether the Commission agrees that such regulatory relief is unnecessary, it should not undertake the type of market analysis proposed by the Notice. Such an undertaking is irrelevant to the issues at hand. In addition, the outcome of such a Commission pronouncement would not only occupy an entire field of market analysis without consideration of current or future fact-specific analyses the Commission may need to undertake (such as a merger of companies that provide broadband services), it could also improperly interfere with the jurisdiction of other expert federal agencies and the judiciary in an inappropriate manner.

Respectfully submitted,

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products A and C don't constrain each other. (Picture, for example, A=dial-up; B=DSL and C=T1; B constrains the price of both C and A, and A constrains the price of B, but people looking for T1 lines don't care what the dial-up cost is). As a practical matter, one basic illustration of how DSL competes with dial-up is the fact that the BOCs, such as Verizon, advertise their xDSL services heavily based on comparisons to dial-up. One of the major themes of such advertising frequently is something like, "how can I download my grandson's picture before he's a grandfather?"

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